OFFICE OF THE GENERAL COUNSEL
Division of Operations-Management

MEMORANDUM OM 04-83 **September 2, 2004**

TO: All Regional Directors, Officers-in-Charge, and Resident Officers

FROM: Richard A. Siegel, Associate General Counsel

SUBJECT: Casehandling Instructions for Cases in which the Status of a Collective-Bargaining Relationship in the Construction Industry is in Issue

The Board recently faced EAJA litigation arising from a case involving a dispute as to whether a collective-bargaining relationship in the construction industry was privileged under Section 8(f) or enjoyed the status of Section 9(a).[1] The adverse Court decision that prompted this proceeding raised evidentiary issues that should be considered during the investigation of such cases.

Under Section 8(f) of the Act, employers and unions in the construction industry may enter into "pre-hire" bargaining relationships where majority support is lacking; such parties may also enter into full Section 9(a) relationships upon a showing of majority support at the time of recognition. Which particular bargaining relationship in the construction industry has been formed under Section 8(f) or 9(a) can be significant for a variety of reasons.[2]

While employers and unions in the construction industry may establish a valid Section 9(a) relationship, the Board presumes, absent proof to the contrary, that bargaining relationships in the construction industry are Section 8(f) relationships.[3] In Central Illinois, the Board held that written contract language standing alone can establish Section 9(a) status if the language unequivocally shows "(1) that the union requested recognition as the majority representative of the unit employees; (2) that the employer granted such recognition; and (3) that the employer's recognition was based

[1] Nova Plumbing, Inc. v. NLRB, U.S. App. Lexis 6149 (D.C. Cir. Mar. 31, 2004).

[2] For example, a representation petition may be processed during the term of a §8(f) collective-bargaining agreement but may be barred by a §9(a) agreement; at the end of the §8(f) bargaining agreement, the employer has no continuing obligation to bargain; in a §9(a) relationship, the union enjoys a rebuttable presumption of majority support after the termination of any collective bargaining agreement and the employer has a continuing duty to bargain. See §8(f) (second proviso); John Deklewa & Sons, 282 NLRB 1375, 1381-1383, 1385-1387 (1987), enf'd. *sub nom* Iron Workers Local 3 v. NLRB, 843 F.2d 770 (3d Cir.), cert. denied 488 U.S. 889 (1988); Central Illinois Construction, 335 NLRB 717, 718 (2001).

[3] Central Illinois, 335 NLRB at 718, citing Deklewa, 282 NLRB at 1385, n.41.

on the union's showing, or offer to show, substantiation of its majority support."[4] In Nova Plumbing, however, when the Board applied this test and found that a Section 9(a) relationship was created by virtue of the contractual language, the D.C. Circuit declined to enforce the Board's order where unrebutted evidence contradicted the contractual assertions.[5] Specifically, the court relied on evidence that when the employer recognized the union, the employees emphatically expressed opposition to union representation.[6] In these circumstances, the court concluded, the presumption that the employer had granted Section 8(f) recognition had not been overcome. The court explained that contract language and intent are "perfectly legitimate *factors*" for determining the nature of a bargaining relationship in the construction industry, but, "[s]tanding alone,…[they] cannot be dispositive, at least where … the record contains strong indications that the parties had only a section 8(f) relationship."[7]

Accordingly, if a charge is premised on a claim that contractual language created a Section 9(a) relationship with an employer in the construction industry, the investigation should include an inquiry into whether there is evidence that contradicts the contractual language.[8] Relevant evidence would include evidence that when recognition was granted there was no representative complement of employees, or that employees who were employed opposed union representation, or that the union made no showing or offer to show majority support. If such evidence is present in a case, the Region should submit the case to Advice. Regions are encouraged to consult with Advice during the investigation process if they have any questions regarding these matters.

If you have any questions regarding this memorandum, please contact your Assistant General Counsel or Deputy or the Division of Advice.

/s/
R.A.S.

cc: NLRBU
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[4] Central Illinois, 335 NLRB at 719, adopting the test articulated by the Tenth Circuit in NLRB v. Triple C Maintenance, Inc., 219 F.3d 1147, 1155-1156 (2000) and NLRB v. Oklahoma Installation Co., 219 F.3d 1160, 1164-1165 (2000).

[5] Nova Plumbing, Inc., 336 NLRB 633 (2001), enf. denied 330 F.3d 531 (D.C. Cir. 2003).

[6] Nova Plumbing v. NLRB, 330 F.3d at 537.

[7] Ibid. (emphasis in original).

[8] Elsewhere, the Board has suggested that §10(b) principles bar an inquiry into whether an ostensible §9(a) relationship entered into six years before the litigation lacked majority support at the time of recognition. Casale Industries, 311 NLRB 951, 953 (1993). It is unclear to what extent the D.C. Circuit's view in Nova Plumbing would affect the Board's holding in Casale Industries. See, Nova Plumbing, 330 F.3d at 538-539.